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Nos. 07-984, 07-990

IN THE

Supreme Court of the United States

COEUR ALASKA, INC.,
Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

STATE OF ALASKA,
Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL REPLY BRIEF FOR RESPONDENTS SOUTHEAST ALASKA CONSERVATION COUNCIL, SIERRA CLUB, AND LYNN CANAL CONSERVATION

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the merits brief of Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation remains accurate.

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INTRODUCTION

As Federal Respondents concede, the Corps may not issue a section 404 permit authorizing a discharge that would violate other provisions of the Clean Water Act. Any such action is not in accordance with law. That EPA shares the erroneous interpretation cannot make an unlawful action lawful.

Petitioners' supplemental briefs consist largely of challenges to the Court's premise that section 306 applies to the Kensington ore mill's wastewater. Their interpretation ignores the language of section 306(e), which contains no exceptions. It also hinges critically on a misreading of section 402's prefatory clause, which Petitioners interpret to mean that any discharge meeting the definition of "fill material" is subject to exclusive Corps jurisdiction under section 404 and exempt from sections 301 and 306. However, that clause says only that EPA may not issue a section 402 permit if the Corps may lawfully issue a section 404 permit for the same discharge.

The Corps concedes that, if section 306 applies, neither agency may issue a permit here, because the standard allows no discharge. Fed. Supp. Br. 16 n.4. Respondents Southeast Alaska Conservation Council, et al., (SEACC) agree with the government that it is therefore not strictly necessary to determine which agency would have permitting authority if the applicable effluent limitation allowed some discharge.

In that circumstance, all parties agree the discharge would be subject to only one permit but disagree as to which program would apply. Petitioners' argument that any discharge meeting an expansive definition of "fill material" may be permitted only

under section 404 suffers from the same flaws as its argument that section 306 does not apply.

ARGUMENT

I. THE SECTION 404 PERMIT MUST BE SET ASIDE.

As the Corps concedes, if section 306 applies to a discharge, it necessarily "circumscribes" the Corps' authority to permit that discharge under the Clean Water Act. *See FCC v. NextWave Personal Comm'ns, Inc.*, 537 U.S. 293, 304 (2003). Any exercise of authority disregarding that constraint is not in accordance with law. *See id.* at 300.

This is true even though the Corps itself would not discharge the prohibited pollutants. Section 306(e) states that "it shall be unlawful" to violate an effluent standard. 33 U.S.C. § 1316(e). On its face, this section declares a legal principle with significance to operators and permitting agencies alike. The explicit premise of the Corps' action here was that section 306 does not apply. If that conclusion was legally erroneous, as the Court posits, the APA requires that the agency's "action" and "conclusions" be "set aside" as "not in accordance with law." 5 U.S.C. § 706(2).[1]

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[1] The State of Alaska's assertion that the solids in the mill's process wastewater will be "non-toxic," State Supp. Br. 20, is not only irrelevant to the lawfulness of the Corps' action, but also false. Tests showed strong toxic effects on macroinvertebrates at the base of the lake's food chain and led the agencies to conclude that the solids may not support these life forms upon closure. *See* J.A. 201a-02a. For this reason, they required a cap of native material. *See* J.A. 309a.

The cases cited by the State are not to the contrary. In none of them did an agency purport to authorize someone to violate a law, as the Corps did here. Rather, in all those cases, the regulated entities could comply with agency authorizations and not necessarily violate any laws. *See Cmty. Television of S. Cal. v. Gottfried*, 459 U.S. 498, 509-10 (1983) (FCC not required to use licensing authority as means to enforce Rehabilitation Act); *NAACP v. FPC*, 425 U.S. 662, 669-71 (1976) (FPC not required to adopt employment discrimination rules unrelated to agency's purposes). In *McLean Trucking Co. v. United States*, 321 U.S. 67, 76, 84-86 (1944), the ICC was not required to ensure compliance with antitrust laws in approving a merger of motor carriers, because Congress had *explicitly exempted* such mergers from the antitrust laws.

In sharp contrast, section 404 contains no exemption from section 306, explicit or implicit. Yet the Corps purported to authorize not just activities that might, improperly implemented, incidentally involve violations of unrelated federal laws, but a discharge that would directly violate section 306. Petitioners can cite no authority holding that a permitting agency may authorize an action that would directly violate the agency's enabling Act.

That EPA also interprets the Clean Water Act is irrelevant. Regardless of which agency initially adopted the legally erroneous interpretation, the resulting agency action—issuance of the section 404 permit—must be set aside. 5 U.S.C. § 706(2). For example, when the Corps adopted its "Migratory Bird Rule," it deferred entirely to EPA's interpretation of the scope of "navigable waters." 51 Fed. Reg.

41,206, 41,217 (Nov. 13, 1986). The Corps' deference to EPA did not deter this Court from setting aside the Corps' rule as contrary to law. *Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs*, 531 U.S. 159, 164, 174 (2001).

Moreover, the Corps here did not merely defer to EPA's interpretation of the Act. The rationale for disregarding section 306 was articulated in the Regas memo. *See* J.A. 144a-45a. The Corps was not a passive recipient of this direction, but coordinated with EPA in developing the memo's legal theory, *see* J.A. 142a, and then adopted it explicitly in its decision on the Kensington permit. *See* J.A. 342a; SER 901 n.89.[2]

Indeed, the Corps has always adopted its own interpretations of the Clean Water Act. From 1977 to 2002, the Corps refused to issue section 404 permits for discharges that EPA, but not the Corps, defined as "fill material." *See* J.A. 27a. Nevertheless, the agencies mutually developed "a longstanding and consistent division of authority" in which the Corps regulated discharges of solid materials "unless the fill amounted to effluent that could be subjected to effluent limitations." *Kentuckians for the Commonwealth v. Rivenburgh*, 317 F.3d 425, 445 (4th Cir. 2003); *see also* J.A. 83a-84a (describing 1986 Memo-

[2] Coeur's argument that the Corps had to follow EPA's lead is based on the agencies' interpretation of 40 C.F.R. § 122.3(b). *See* Coeur Supp. Br. 2-3. However, EPA amended that regulation in 1979 specifically to recognize that EPA may issue section 402 permits for discharges of "fill material" where a section 404 permit is not available. *See infra* pp. 8-10. Coeur turns the regulation on its head by portraying it as an attempt by EPA to foist permitting authority on the Corps.

randum of Agreement). The Corps was not required to, and did not, simply defer to EPA's interpretation.

Coeur's suggestion that SEACC should have sued EPA not only disregards the fundamental APA command that agency action not in accordance with law be set aside, but also misunderstands SEACC's claims. *See* Coeur Supp. Br. 18. SEACC has no quarrel with the 404(b)(1) guidelines. Nor does SEACC challenge EPA's discretionary decision not to veto the permit, which the agency may do only if it finds "an unacceptable adverse effect…." 33 U.S.C. § 1344(c). And while SEACC's claim squarely challenges the conclusions of the Regas memo, the memo by itself is not "final" agency action subject to judicial review. 5 U.S.C. § 704. The "final" action authorizing the unlawful discharge was the Corps permit. Thus, SEACC properly sued the Corps, as the government's brief tacitly acknowledges.

The government argues that the Forest Service's Record of Decision (ROD) approving the mine's operating plan should not be set aside under the "not in accordance with law" standard. Fed. Supp. Br. 8-11. While SEACC disagrees, that standard was not the basis for SEACC's claim.[3] SEACC argued, and the Ninth Circuit presumably agreed,[4] that the ROD and Goldbelt's permit were "arbitrary and capricious" because their rationale depended critically on using Lower Slate Lake for the discharge of process

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[3] Responding to the Court's order, SEACC answered in the affirmative, but the Court's question did not address SEACC's actual claim.

[4] The Ninth Circuit's opinion does not specify the standard it applied. *See* J.A. 549a-50a.

wastewater. This rationale, SEACC argued, was not sufficient if the discharge permit was itself unlawful. *See* SEACC Ninth Circuit Br. 51-52 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The ROD authorizes roads, structures, and activities on public land that would be completely unnecessary if the Corps permit were set aside and an alternative waste disposal site selected.

No party sought certiorari on the propriety of the ROD (or the Goldbelt permit). The Court's order on supplemental briefing does not address—and no party has briefed—whether the decision was "arbitrary." SEACC therefore urges the Court not to decide that question.[5]

II. SECTION 306 APPLIES TO THE WASTEWATER DISCHARGE FROM THE ORE MILL.

Petitioners devote much of their briefs to attacking the premise of the Court's questions, that the process wastewater discharge from the Kensington ore mill would violate section 306(e), but to no avail. Petitioners and the government argue, in effect, that a high level of suspended solids in an untreated industrial effluent effectively exempts it from applicable effluent limitations. Such a holding would eviscerate the Clean Water Act's most important tools for protecting the nation's waters.

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[5] Goldbelt's new argument that its permit may be sustained separately from the mine's section 404 permit is outside the questions presented *and* the Court's supplemental questions.

The plain language of section 306(e) is without exception: "it shall be unlawful for *any* owner or operator of *any* new source to operate such source in violation of *any* standard of performance applicable to such source." 33 U.S.C. § 1316(e) (emphasis added). Here, the standard of performance (40 C.F.R. § 440.104(b)(1)) is explicitly applicable to the source (the Kensington mill). *See also* 40 C.F.R. § 440.100(a)(2) ("The provisions of this subpart J are *applicable* to discharges from … Mills that use the froth-flotation process … for the beneficiation of … gold … ores" (emphasis added)).

Petitioners attempt to escape this plain language through a two-step argument, both steps of which are flawed. They point first to section 402's prefatory clause: "Except as provided in sections [318] and [404], the Administrator may … issue a permit…." 33 U.S.C. § 1342(a)(1). They read this language to mean that section 404 is the *only* authority for permitting any discharge that meets a broad definition of "fill material," even if the proposed discharge is industrial process wastewater subject to an effluent limitation. The second step of their argument is that the *only* laws circumscribing the Corps' discretion to issue a permit are those named explicitly in section 404.

Petitioners' interpretation of section 402's prefatory clause is incorrect. That clause modifies EPA's authority based on what is "provided" in section 404. *Id.* Section 404, in turn, provides a grant of discretionary authority to the Corps: "The [Corps] may issue permits … for the discharge of dredged or fill material…." *Id.* § 1344(a). Thus, the pivotal issue for purposes of the prefatory clause is not whether

the discharge is "fill material," as argued by Petitioners, but whether the Corps may lawfully issue a permit.

This interpretation is reinforced by the scope of EPA's authority in section 402, which is to issue permits for the discharge of "*any* pollutant, or combination of pollutants…." *Id.* § 1342(a)(1) (emphasis added). The definition of "pollutant" includes "solid waste." *Id.* § 1362(6). Had Congress intended to grant the Corps *exclusive* authority to permit any discharge meeting an expansive definition of "fill material," the most logical way to do so would have been to limit the types of pollutants for which EPA could issue permits. Instead, the only relevant limitation on EPA's section 402 authority is the prefatory clause's reference to what section 404 "provide[s]"—a discretionary power to issue permits.

EPA itself adopted this interpretation of the Act in a 1979 regulation that remains on the books in substantially the same form today. EPA's 1973 regulations purported to exempt from section 402 ("NPDES") permitting requirements any "dredged or fill material discharged into navigable waters." 38 Fed. Reg. 13,528, 13,530 (May 22, 1973) (adopting former 40 C.F.R. § 125.4(d)). However, when the Corps amended its definition of "fill material" in 1977 to exclude discharges for waste disposal purposes, *see* J.A. 27a, it left a regulatory gap. Both agencies excluded discharges of solid-laden industrial effluents from their permit programs: the Corps because they were for disposing of waste and therefore not "fill material" under the Corps' definition; and EPA because they had the effect of fill and there-

fore *were* "fill material" under EPA's definition. *See generally id.*; 38 Fed. Reg. at 13,530.

To correct this problem, EPA amended its permitting regulation in 1979 to exempt from section 402 only those fill material discharges that were regulated under section 404, recognizing that some "fill material" was *not* subject to section 404. The new regulation exempted "[d]ischarges of dredged or fill material into waters of the United States *and regulated under section 404 of the Act*." 44 Fed. Reg. 32,854, 32,902 (June 7, 1979) (adopting former 40 C.F.R. § 122.4(a)(2); emphasis added). EPA explained the purpose for this change when it published the draft rule in 1978:

> Clarify that *certain discharges of dredged or fill material are subject to the NPDES program rather than the section 404 permit program*. Consistent with regulations promulgated by the U.S. Army Corps of Engineers to govern the section 404 permit program, these discharges are subject to the NPDES program if their primary purpose is the disposal of waste materials rather than changing the bottom elevation of a water body.

43 Fed. Reg. 37,078, 37,079 (Aug. 21, 1978) (emphasis added).

In 1980, EPA changed "and" to "which are," the language that remains today. 45 Fed. Reg. 33,290, 33,442 (May 19, 1980) (adopting former 40 C.F.R. § 122.51(c)(2)(ii), now 40 C.F.R. § 122.3(b)). The preamble did not explain this specific change but stated generally, "Minor editorial and stylistic changes …

have been made in all sections and are not discussed." 45 Fed. Reg. at 33,294.

Consistent with these regulations, EPA for decades routinely adopted effluent limitations—and granted section 402 permits—for industrial sources whose untreated wastewater contained high levels of suspended solids, despite the fact that they were "fill material" under EPA's definition. *See* SEACC Supp. Br. 15. EPA did not amend 40 C.F.R. § 122.3(b) when the agencies jointly adopted the effects-based fill rule in 2002, leaving in place section 122.3's recognition that some fill material discharges are not regulated under section 404. *See*, *e.g.*, J.A. 47a-48a (tailings subject to effluent limitations would continue to require section 402 permits).

Thus, the Regas memo's interpretation of 40 C.F.R. § 122.3(b) is contrary to: (1) its plain language, which recognizes that some fill material discharges are not regulated under section 404; (2) the stated purpose for which the regulation in its current form was adopted; (3) the plain language of section 402's prefatory clause; and (4) EPA's longstanding practice of issuing section 402 permits for industrial wastewater discharges that, left untreated, would meet EPA's "fill material" definition.

The second step of Petitioners' argument for an implied exception to section 306(e) is that the only legal constraints on a section 404 permit are those listed explicitly in section 404. However, the Corps now acknowledges that this argument is wrong, recognizing that other laws circumscribe its discretion and that "the Corps is accustomed to looking beyond its own enabling statutes in determining whether Section 404 permits should be issued." Fed. Supp.

Br. 6. If even laws outside the Clean Water Act circumscribe the Corps' authority, then certainly other sections of the same Act do so as well. *See NextWave*, 537 U.S. at 300. Indeed, the Corps now points out that its own regulations require it to consider "applicable effluent limitations" when granting permits. Fed. Supp. Br. 6 (quoting 33 C.F.R. § 320.4(d)).

III. NO PERMIT IS AVAILABLE HERE.

SEACC and the government agree that, if section 306 applies to the Kensington mill, neither agency may issue a permit because of the zero-discharge limit. They further agree that it is therefore not strictly necessary to determine which agency would have permitting authority in the circumstance of an effluent limitation that allowed some discharges. *See* Fed. Supp. Br. 16 n.4.

In their supplemental brief, Federal Respondents hypothesize that it may be possible in that circumstance for the Corps to apply effluent limitations in section 404 permits, while identifying potential practical and legal problems with such an approach.[6] *See id.* at 14-16. They urge the Court not to resolve the issue but to leave it to the agencies to determine which program would apply. *See id.* at 16 n.4.

SEACC believes the only plausible conclusion is that section 402 provides the proper permitting au-

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[6] An additional problem is that, when effluent limitations apply, there are few if any circumstances in which a section 404 permit is even possible. Application of effluent limitations will normally remove most or all solids, with the result that the permitted *discharge* is not "fill material" and therefore not subject to section 404. *See* SEACC Supp. Br. 15.

thority for discharges subject to effluent limitations, consistent with the Act, regulations, and decades of past practice. *See*, *e.g.*, SEACC Supp. Br. 13-15; *supra* pp. 6-11. It is not necessary, as the government suggests, to amend the 2002 fill rule to achieve this purpose. EPA's regulations already allow it to grant section 402 permits for discharges of fill material that are not regulated under section 404, *see supra* pp. 7-10, a practice the agencies repeatedly stated they intended to continue under the 2002 rule. *See* SEACC Supp. Br. 14.

Nevertheless, SEACC has no objection to the government's request that the hypothetical question remain undecided. The only essential holding here is that the section 404 permit actually at issue is not in accordance with section 306.

CONCLUSION

Under the plain language of the Act, agency regulations, and longstanding practice, section 306(e) applies to the Kensington ore mill. Because the applicable standard prohibits all process wastewater discharges, the permit is "not in accordance with law" and must be set aside.

Respectfully submitted,

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